

**A Perbadanan Pengurusan City Plaza v Sigma Elevator (M) Sdn
Bhd**

**B COURT OF APPEAL (PUTRAJAYA) — CIVIL SUIT
NO J-02(C)(A)-2437-12 OF 2021
ABDUL KARIM, AHIMAD ZAIDI IBRAHIM AND MARIANA
YAHYA JJCA
30 DECEMBER 2023**

C *Arbitration — Security for costs — Appellant initiated arbitration proceedings
against respondent — Respondent applied for security for costs against appellant
while arbitration proceeding was ongoing — Whether judicial commissioner
D failed to consider appellant's arbitration claim — Arbitration Act 2005 s 11*

E The appellant ('defendant') offered a contract to the respondent ('plaintiff') to
upgrade 11 lifts located in City Plaza in Johor Bahru ('the contract') and the
plaintiff accepted the offer. The contract provided for an arbitration clause in
the event of a dispute between the parties. Subsequently, a dispute arose
between the parties where the defendant alleged the plaintiff had breached the
contract while the plaintiff claimed they were not paid accordingly by the
defendant. The plaintiff commenced an adjudication claim against the
defendant under the Construction Industry Payment and Adjudication Act
F 2012. The plaintiff's claim was allowed by the adjudicator, who ordered the
defendant to pay RM1,020,46742 as well as costs and interests to the plaintiff.
Following the adjudication decision ('AD'), the plaintiff applied to enforce the
AD while the defendant applied to set aside/to stay execution of the AD. The
High Court allowed the plaintiff's application and dismissed the defendant's
G application. Thereafter, the defendant initiated arbitration proceedings against
the plaintiff under the Arbitration Act 2005 ('the Act') in line with the
arbitration clause in the contract, claiming damages for breach of contract.
Whilst the arbitration was ongoing, the plaintiff applied for security for costs
against the defendant before the High Court. The learned judicial
H commissioner ('JC') allowed the plaintiff's application and ordered the sum of
RM400,000 to be paid to the plaintiff's solicitor as a stakeholder. Hence, this
appeal by the defendant. The defendant challenged the JC's decision on two
main grounds ie: (i) the JC had failed to consider other relevant matters,
especially the defendant's arbitration claim; and (ii) the JC's finding/ruling on
I the defendant's impecuniosity/financial capability to pay costs.

Held, allowing the appeal:

- (1) The defendant's arbitration claims and matters related to it, including the merits and the chance of success, were relevant matters which should be

considered by the court in a security for costs application under s 11 of the Act. The JC failed to consider relevant considerations when imposing security for costs, viz, the defendant's claim. The JC, in considering solely the defendant's financial status and thereafter ordering such a high sum as security, had stifled the bona fide claim of the defendant, which was then pending before the arbitration. Moreover, the plaintiff conceded that the defendant's arbitration claim was not mala fide nor made with bad intention. Since the JC did not even look into the matters pertaining to the arbitration claim, it was not wrong for the court to conclude that the JC gave no consideration as to the defendant's prospect of success in the arbitration. The JC's grounds of judgment ('GOJ') did not state anything concerning the defendant's arbitration claim. The whole of the GOJ only spoke about the defendant's financial standing and capability. The JC failed to consider all the circumstances of the case, which necessarily, included considering the defendant's arbitration claim as to whether it was bona fide and legitimate with a reasonable chance of success or otherwise. Thus, intervention of the court was entitled. The JC's exercise of discretion to order security for costs on the defendant was legally wrong for failing to consider the defendant's arbitration claim (see paras 26–29 & 33–36).

- (2) Ground (i) was pivotal to the defendant's appeal and would be determinative of the defendant's appeal herein as a whole. As such, ground (ii) was academic because even if the JC was correct in respect of the defendant's impecuniosity and inability to pay costs for the arbitration, based on the finding and ruling that the JC was plainly wrong pertaining to ground (i), it would not make any difference to the decision abovesaid (see para 41).

[Bahasa Malaysia summary]

Perayu ('defendan') menawarkan kontrak kepada responden ('plaintif') untuk menaik taraf 11 lif yang terletak di City Plaza di Johor Bahru ('kontrak') dan plaintif menerima tawaran tersebut. Kontrak itu memperuntukkan klausa timbang tara sekiranya berlaku pertikaian antara pihak-pihak. Selepas itu, timbul pertikaian antara pihak-pihak di mana defendan mendakwa plaintif telah melanggar kontrak manakala plaintif mendakwa mereka tidak dibayar sewajarnya oleh defendan. Plaintif memulakan tuntutan adjudikasi terhadap defendan di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012. Tuntutan plaintif dibenarkan oleh adjudikator, yang memerintahkan defendan membayar RM1,020,46742 serta kos dan faedah kepada plaintif. Berikutan keputusan adjudikasi ('AD'), plaintif memohon untuk menguatkuasakan AD manakala defendan memohon untuk mengeneipkan/menghentikan pelaksanaan AD. Mahkamah Tinggi membenarkan permohonan plaintif dan menolak permohonan defendan. Selepas itu, defendan memulakan prosiding timbang tara terhadap plaintif di

- A bawah Akta Timbang Tara 2005 ('Akta') selaras dengan klausa timbang tara dalam kontrak, menuntut ganti rugi bagi pelanggaran kontrak. Semasa timbang tara sedang berjalan, plaintif memohon jaminan untuk kos terhadap defendan di hadapan Mahkamah Tinggi. Pesuruhjaya kehakiman yang bijaksana ('PK') membenarkan permohonan plaintif dan memerintahkan
- B jumlah RM400,000 dibayar kepada peguam plaintif sebagai pemegang kepentingan. Oleh itu, rayuan ini oleh defendan. Defendan mencabar keputusan PK atas dua alasan utama iaitu: (i) PK telah gagal mempertimbangkan perkara lain yang berkaitan, terutamanya tuntutan timbang tara defendan; dan (ii) penemuan/keputusan PK mengenai
- C ketidakcekapan/keupayaan kewangan defendan untuk membayar kos.

Diputuskan, membenarkan rayuan:

- D (1) Tuntutan timbang tara defendan dan perkara yang berkaitan dengannya, termasuk merit dan peluang kejayaan, adalah perkara berkaitan yang harus dipertimbangkan oleh mahkamah dalam permohonan jaminan untuk kos di bawah s 11 Akta. PK gagal mempertimbangkan pertimbangan yang relevan apabila mengenakan jaminan untuk kos, iaitu tuntutan defendan. PK, dalam mempertimbangkan semata-mata
- E status kewangan defendan dan selepas itu mengarahkan jumlah yang tinggi sebagai jaminan, telah menyekat tuntutan bona fide defendan, yang belum selesai di timbang tara. Selain itu, plaintif mengakui bahawa tuntutan timbang tara defendan tidak mala fide atau dibuat dengan niat yang tidak baik. Memandangkan PK tidak meneliti perkara yang
- F berkaitan dengan tuntutan timbang tara, adalah tidak salah untuk mahkamah membuat kesimpulan bahawa PK tidak memberi pertimbangan tentang prospek kejayaan defendan dalam timbang tara. Alasan penghakiman PK ('AP') tidak menyatakan apa-apa mengenai tuntutan timbang tara defendan. Seluruh AP hanya bercakap tentang kedudukan kewangan dan keupayaan defendan. PK gagal
- G mempertimbangkan semua keadaan kes itu, yang semestinya, termasuk mempertimbangkan tuntutan timbang tara defendan sama ada ia bona fide dan sah dengan peluang yang munasabah untuk berjaya atau sebaliknya. Oleh itu, campur tangan mahkamah adalah wajar. Penggunaan budi bicara PK untuk memerintahkan jaminan untuk kos
- H terhadap defendan adalah salah di sisi undang-undang kerana gagal mempertimbangkan tuntutan timbang tara defendan (lihat perenggan 26–29 & 33–36).
- I (2) Alasan (i) adalah penting kepada rayuan defendan dan akan menjadi penentu rayuan defendan di sini secara keseluruhan. Oleh itu, alasan (ii) adalah akademik kerana jikapun PK adalah betul berkenaan dengan ketidakcekapan dan ketidakupayaan defendan untuk membayar kos untuk timbang tara, berdasarkan dapatan dan keputusan bahawa PK adalah jelas salah berkaitan dengan alasan (i), ia tidak akan memberi

sebarang perbezaan kepada keputusan di atas (lihat perenggan 41).]

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Cases referred to

Customer Loyalty Solutions Sdn Bhd v Advance Information Marketing Bhd & Anor [2017] MLJU 1919; [2017] 1 LNS 1894, HC (folld)

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Faridah Begum bte Abdullah v Dato' Michael Chong [1995] 2 MLJ 404, HC (refd)

Haidakota (M) Sdn Bhd v Tan Tiam Chai [2008] MLJU 654; [2009] 1 CLJ 699, CA (folld)

KNM Process Systems Sdn Bhd v Lukoil Uzbekistan Operating Company LLC [2020] MLJU 85; [2020] 1 LNS 479, CA (refd)

C

Ling Khoo Ming v Ling Shew Kue @ Ling Chai Yuen & Anor [2018] MLJU 1059; [2018] 1 LNS 1139, CA (refd)

Measat Broadcast Network Systems Sdn Bhd v AV Asia Sdn Bhd [2014] MLJU 1860; [2014] 3 CLJ 915, HC (refd)

Mechanalysis Sdn Bhd (in liquidation) v Appraisal Property Management Sdn Bhd [2016] 11 MLJ 566; [2016] 8 CLJ 81, HC (folld)

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Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (folld)

North Plaza Sdn Bhd v United Securities Sdn Bhd [2010] 1 MLJ 631, CA (folld)

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Sagajuta (Sabah) Sdn Bhd v Trane Malaysia Sales & Services Sdn Bhd [2017] MLJU 1251; [2017] 1 LNS 1243, HC (refd)

Skrine & Co v MBF Capital Bhd & Anor [1998] 3 MLJ 649, CA (refd)

Legislation referred to

Arbitration Act 2005 s 11, 11(1)(e)

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Construction Industry Payment and Adjudication Act 2012 ss 15, 18, 28

Appeal from: *Sigma Elevator (M) Sdn Bhd v Perbadanan Pengurusan City Plaza* [2021] MLJU 2905 (High Court, Johor Bahru)

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Ong Chee Yong (with Jayananthini) (CY Ong & Co) for the appellant.

Deepak Mahadevan (with Faeza Suraya bt Roselan) (Azmi Fadzly Maha & Sim) for the respondent.

Ahmad Zaidi JCA:

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INTRODUCTION

[1] The parties hereinafter shall be referred to as they were before the Johor Bahru High Court in Originating Summons No JA-24C(ARB)-1-07 of 2021.

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[2] Vide Originating Summons No JA-24C(ARB)-1-07 of 2021 abovesaid, the plaintiff (Sigma Elevator (M) Sdn Bhd) had applied for security for costs in the sum of RM400,000 against the defendant (Perbadanan

A Pengurusan City Plaza) pursuant to s 11 of the Arbitration Act 2005 ('the AA 2005').

[3] On 28 November 2021, the learned High Court judicial commissioner ('JC') allowed the plaintiff's said application with costs and ordered the said security sum be paid to the plaintiff's solicitor as a stakeholder.

THE FINDINGS AND RULINGS OF THE HIGH COURT DATED 28 NOVEMBER 2021

C [4] Based on the grounds of judgment ('GOJ') the learned JC ruled that there is reasonable doubt about the defendant's ability to pay costs if the defendant is unsuccessful at the arbitration. His Lordship's ruling/order is founded on the following findings:

D (a) that the defendant is insolvent, as admitted by the defendant, and that its account has been frozen. Its audited account for 2019 showed a deficit (paras 14–16 GOJ referred to). The learned JC referred amongst others, to the cases of *Ling Khoo Ming v Ling Shew Kue @ Ling Chai Yuen & Anor* [2018] MLJU 1059; [2018] 1 LNS 1139; and *Skrine & Co v MBF Capital Bhd & Anor* [1998] 3 MLJ 649;

E (b) that it is undisputed that the defendant failed to pay costs ordered/awarded earlier to the plaintiff amounting to RM80,000 and no cogent reason was given by the defendant for such failure (paras 18–21 GOJ referred to). The learned JC referred to amongst others, the case of *Sagajuta (Sabah) Sdn Bhd v Trane Malaysia Sales & Services Sdn Bhd* [2017] MLJU 1251; [2017] 1 LNS 1243; and

F (c) as to the amount for security, based on the fact that the arbitration claim is for RM5m, the adjudication decision ('AD') sum is RM1m plus and previous costs of RM80,000 the learned JC was of the view it was fair and reasonable (paras 23 GOJ referred to).

G [5] Dissatisfied with the aforementioned decision/order, defendant appeals to the Court of Appeal. Hence, this appeal before us.

H OUR DECISION/ORDER

I [6] After having appraised the appeal records and considering the submissions by learned counsels for both sides, we unanimously found merits in the defendant's appeal. Hence, we accordingly allowed the defendant's appeal herein with costs of RM5,000, subject to the allocator. Accordingly, the order of the learned JC is thus set aside.

[7] We allowed the defendant's appeal on the following grounds:

CHRONOLOGY OF EVENTS

[8] The relevant chronology of events leading to the plaintiff filing the application (Originating Summons No JA-24C(ARB)-1-07 of 2021) is as follows:

- (i) vide offer letter dated 22 December 2014 the defendant offered a contract titled 'Proposed Lift Modernisation for City Plaza at 21, Jalan Tebrau, 80300 Johor Bahru' to the plaintiff, to upgrade 11 lifts located in City Plaza in Johor Bahru ('the contract'). The upgrading works cover:
 - (a) seven tower lifts (P3, P4, P5, P6, P7, P8 and P9);
 - (b) two car park lifts (P1 and P2); and
 - (c) two service lifts (S10 and S11);
- (ii) on 9 January 2015, the plaintiff accepted the aforesaid offer. Parties agreed to the terms in the offer letter and to follow the PAM contract (PAM contract (without quantity) 2006). The contract was for approximately two years, from 31 December 2014 until 11 November 2016. The contract provided for an arbitration clause in the event of a dispute between the parties;
- (iii) subsequently, a dispute arose between the parties, culminating in the defendant issuing a letter dated 28 December 2016 to the plaintiff, alleging that the plaintiff had breached the contract and had repudiated the same;
- (iv) the defendant conceded that works for nine of the 11 lifts had been performed and handed over by the plaintiff. The defendant, however, averred that the works relating to the nine lifts were faulty and not properly upgraded as per the terms of the contract and that two lifts have yet to be upgraded by the plaintiff;
- (v) the defendant alleged that as the plaintiff failed to rectify/make good the defects and due to complaints lodged by the residence of City Plaza, it was forced to engage third party contractor, TMS Engineering Sdn Bhd ('TMS'), for the repair works and ended up paying RM1,015,427 to TMS;
- (vi) regarding the works done, the plaintiff claimed they were not paid accordingly by the defendant. Thus, the plaintiff commenced an adjudication claim against the defendant under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA 2012');
- (vii) on 22 January 2018, the plaintiff's claim was allowed by the adjudicator, who ordered the defendant to pay RM1,020,467.42 as well as costs and interests to the plaintiff;

- A (viii) following the adjudication decision ('AD'), the plaintiff applied to the High Court to enforce the said AD under s 28 of the CIPAA 2012. Almost at the same time, the defendant applied to the High Court to set aside/to stay execution of the AD pursuant to ss 15 and 18 of the CIPAA 2012;
- B (ix) having heard the applications together, on 28 November 2018, the High Court allowed the plaintiff's application and simultaneously dismissed the defendant's application;
- C (x) the defendant appealed to the Court of Appeal against the decision of the High Court abovesaid. The appeal was subsequently dismissed;
- (xi) ensuing from the abovesaid, the plaintiff proceeded to enforce the AD by way of a judgment debtor summon ('JDS'), resulting in the defendant being ordered by the court to pay RM30,000 monthly to the plaintiff towards settling the AD sum;
- D (xii) following the dispute between the parties as mentioned in sub-paras (iii), (iv) and (v) above, the defendant commenced a civil suit against the plaintiff in the High Court for damages for breach of the contract. However, the plaintiff objected to the filing of the claim before the court, arguing that the dispute should go to arbitration as agreed upon by the parties under the contract. Thus, the suit was struck out by the High Court accordingly;
- E (xiii) thereafter, on 16 December 2018, the defendant initiated arbitration proceedings against the plaintiff under the Arbitration Act 2005 ('the AA 2005') in line with the arbitration clause in the contract, claiming damages for breach of contract;
- F (xiv) whilst the arbitration was ongoing, the plaintiff applied to the arbitrator for security for costs against the defendant. The arbitrator instructed the plaintiff to apply to the High Court instead; and
- G (xv) acting on the direction of the arbitrator, the plaintiff then filed Originating Summons No JA-24C(ARB)-1-07 of 2021 for security for costs before the High Court.
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ORIGINATING SUMMONS NO JA-24C(ARB)-1-07 OF 2021

The plaintiff's grounds for applying

- I [9] The plaintiff proffered three main reasons for applying for security for costs, viz:
 - (a) that the defendant had admitted to being insolvent;

- (b) that the defendant failed to pay the costs earlier ordered by the adjudicator, the High Court and the Court of Appeal; and A
- (c) that the potentially high costs of the arbitration would prejudice the plaintiff. B

The defendant's grounds for challenging/objecting

[10] The defendant gave the following grounds:

- (a) that the plaintiff's application is mala fide; C
- (b) that there are merits in the defendant's arbitration claim and is legitimate and bona fide;
- (c) that the plaintiff is not prejudiced as it was paid RM30,000 monthly as per the JDS order; D
- (d) that the defendant's ailing financial state was due to the plaintiff's breach of the contract; and
- (e) that the plaintiff's application is aimed at curtailing and derailing the arbitration proceeding. E

THE LAW — SECURITY FOR COSTS

[11] The law on point relating to security for costs under s 11 of the Arbitration Act 2005 is trite and well settled, and that is, firstly, before or during an arbitral proceeding, the High Court may make interim orders/measures, one of which, is for a party to provide security for costs (s 11(1)(e) of the AA 2005 referred to). F

[12] Secondly, the court must consider the case/application in its entirety. The defendant's impecuniosity and financial standing alone are insufficient (the cases of *Customer Loyalty Solutions Sdn Bhd v Advance Information Marketing Bhd & Anor* [2017] MLJU 1919; [2017] 1 LNS 1894 and *Measat Broadcast Network Systems Sdn Bhd v AV Asia Sdn Bhd* [2014] MLJU 1860; [2014] 3 CLJ 915 amongst others referred to). G H

[13] Thirdly, since an order for security for costs involved an exercise of discretion, it should not simply be disturbed at the appellate stage, save if it can be shown that the exercise of discretion is legally wrong (the cases of *KNM Process Systems Sdn Bhd v Lukoil Uzbekistan Operating Company LLC* [2020] MLJU 85; [2020] 1 LNS 479 and *Haidakota (M) Sdn Bhd v Tan Tiam Chai* [2008] MLJU 654; [2009] 1 CLJ 699 amongst others, referred to). I

A OUR DECISION AND FINDINGS

[14] Based on the defendant's (appellant's) memorandum of appeal, the defendant challenged the learned JC's order/decision on two main heads/grounds. The first ground concerned the defendant's contention that the learned JC had failed to consider other relevant matters, especially the defendant's arbitration claim. According to counsel, the arbitration claims were made bona fide. The learned JC failed to consider the merits of the arbitration claims.

[15] The second challenge pertains to the learned JC's finding/ruling on the defendant's impecuniosity/financial capability to pay costs. Learned counsel submitted that the learned JC was in error and was plainly wrong in finding that defendant could not pay the cost of the arbitral proceeding if it was unsuccessful in the arbitration.

Ground (i) — The failure to consider the arbitration claim etc

[16] In our view, ground (i) is pivotal to the defendant's overall appeal.

[17] To start with, based on the principle of law as stated in para 13 above mentioned, since the order for security for costs herein involved an exercise of discretion, it should not simply be disturbed at the appellate stage by this panel, save if it can be shown that the exercise of discretion is legally wrong. What makes an exercise of discretion legally wrong or otherwise is a factual matter.

[18] The law is clear that taking into account irrelevant considerations or failing to consider relevant considerations by the court would also make the exercise of discretion legally wrong in law. The question is, what are the matters to be regarded as relevant considerations? Again, it is factual.

[19] In the Court of Appeal case of *Haidakota (M) Sdn Bhd v Tan Tiam Chai*, Gopal Sri Ram JCA (as he then was) said the following:

[2] ... An order directing security for costs is a discretionary order. The general principle upon which this court acts in appeal against such orders is that it will not interfere unless it is demonstrated that the primary judge had taken into account irrelevant considerations or *failed to take into account relevant considerations* ... (Emphasis added.)

[20] Learned counsel for the defendant claimed that the defendant's financial woes was the causal effect of the plaintiff's breach of the contract on which the defendant's arbitration claims hinges on. Counsel further argued that the defendant's arbitration claim must be considered, whether the claim is

bona fide and legitimate, with a reasonable chance of success. Learned counsel therefore argued that the matters relating to the defendant's arbitration claims are relevant considerations to be taken into account for security for costs. As the learned JC failed to take them into consideration, His Lordship was thus plainly wrong. As we see it, this formed the nuts and bolts of the defendant's appeal before us.

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[21] The learned counsel for the plaintiff/respondent countered the defendant's aforesaid contention and instead submitted that the learned JC was correct and not plainly wrong. Counsel submitted that the arbitration claim is irrelevant in determining security for costs.

C

[22] Learned counsel referred to the case of *Customer Loyalty* to argue that the merits of the arbitration claim are irrelevant consideration for security for cost.

D

[23] However, plaintiff's counsel submitted in our case, it is not true that the learned JC only considered the defendant's financial position when deciding the plaintiff's application. According to counsel, the court had also considered other matters, including the plaintiff's garnishee application and the defendant's failure/refusal to pay costs ordered by the court.

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[24] Counsel submitted that the other issues raised by the defendant's counsel, including the merits of the defendant's arbitration claim, are irrelevant and unnecessary in an application for security for costs as held by the court in the case of *Customer Loyalty*. Counsel went further to submit that even if it is relevant, it has been considered by the learned JC.

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Our decision for ground (i)

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[25] It is noteworthy that, in response to the defendant's/appellant's submission on this issue, learned counsel for the plaintiff/respondent in his reply submission (encl 26), at paras 24.1 and 24.2, conceded that the court must consider the case in its entirety in an application for security for costs and that the defendant's/appellant's financial position alone would not warrant security for costs.

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[26] Having appraised the appeal records, the cases referred to, and the submissions by both learned counsels, we are not persuaded by the submission by the plaintiff's counsel. Instead, we agreed with the defendant's counsel on the point as to the relevance of the defendant's arbitration claim to the application for security for costs. We are of the considered view that the defendant's arbitration claims and matters related to it, including the merits and the chance of success, are relevant matters which should be considered by

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A the court in a security for costs application under s 11 of the AA 2005. We are in concurrence with the views and decisions in the following cases:

(a) *Haidakota (M) Sdn Bhd v Tan Tiam Chai* wherein Gopal Sri Ram JCA (as he then was) said the following:

B [2] ... An order directing security for costs is a discretionary order. The general principle upon which this court acts in appeal against such orders is that it will not interfere unless it is demonstrated that the primary judge had taken into account irrelevant considerations *or failed to take into account* relevant considerations ...

C ... I do not agree with the contention of the defendant that the plaintiff's chances of being successful in a claim to be irrelevant consideration as far as an application for security for costs is concerned (Emphasis added.)

D [27] As held in *Haidakota* abovesaid, we are of the view the learned JC failed to consider relevant considerations when imposing security for costs, viz, the defendant's claim:

E (b) *Mechanalysis Sdn Bhd (in liquidation) v Appraisal Property Management Sdn Bhd* [2016] 11 MLJ 566; [2016] 8 CLJ 81, wherein Mohd Nazlan Ghazali J held:

F ... the court has the discretion to order security *by taking into consideration* all the circumstances of the case in order to achieve a balance between ensuring that protection is afforded to a defendant and a legitimate claim by a plaintiff is not stifled. (Emphasis added.)

G [28] In the circumstances of our case, we are of the view that the learned JC, in considering solely the defendant's financial status and thereafter ordering such a high sum as security, had stifled the bona fide claim of the defendant, which was then pending before the arbitration. In our view, it is pertinent to note that learned counsel for the plaintiff conceded that the defendant's arbitration claim is not mala fide nor made with bad intention (respondent's reply submission para 41.2 — encl 26 referred to):

H (c) *North Plaza Sdn Bhd v United Securities Sdn Bhd* [2010] 1 MLJ 631 where it was held by Hishamuddin Yunus CJA as follows:

I ... it is a principle of law the respondent's prospect of success is also relevant factor (amongst factors) in deciding as to whether or not security for costs ought to be ordered against the respondent (see *Drumduro Pty Ltd v Braham* [1982] 7 ACLR 131 and *KD Resources Sdn Bhd v Ng Boon Jieh & Son Realty Sdn Bhd* [2002] MLJU 627; [2002] 3 MLRH 382.

[29] In our case, since the learned JC did not even look into the matters pertaining to the arbitration claim, it is in our considered view that it is not

wrong for this court to conclude that the learned JC gave no consideration as to the defendant's prospect of success in the arbitration.

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[30] As for the case of *Customer Loyalty* which the learned counsel for the plaintiff referred to argue that the merits of the arbitration claim are irrelevant consideration for security for costs, with respect we are unable to agree. As we see it, the court in that case, quoted with approval the judgment by Arifin Zakaria J in *Faridah Begum bte Abdullah v Dato' Michael Chong* [1995] 2 MLJ 404, held as follows:

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[47] ... An application for security for costs is decidedly very much interlocutory in nature. Thus, *any suggestion that this court should undertake a detailed investigation into the merits* of the underlying writ action in order to determine the prospect of the plaintiff's claim for the return of the disputed sum must therefore be rejected for being pre-mature and untenable.

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[31] Hence, it is clear that the court did not say the merits of the arbitration claim are irrelevant consideration. Instead, what was decided was that in an application for security for costs, the court should not embark on a detailed investigation into the merits. Merit is still relevant.

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[32] Based on the aforementioned authorities, we are in accord with learned counsel for the defendant. In our considered view, the merits of the defendant's arbitration claim, whether bona fide and legitimate, are material and relevant matters to be considered by the court when entertaining the security for costs application.

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[33] Learned counsel for the plaintiff submitted that the learned JC had taken all relevant matters/considerations. We are however not persuaded because the learned JC's GOJ did not state anything concerning the defendant's arbitration claim. Nowhere in the said GOJ does the judgment speak about the defendant's arbitration claim. The whole of the said GOJ only speaks about the defendant's financial standing and capability. No merits or the status of the arbitration was touched upon. Therefore, to say that the learned JC had considered the matters relating to the defendant's arbitration claim would run contrary to the written records and purely speculative.

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[34] To be fair, the learned JC, in ordering security for costs against the defendant, had referred to the case of *Mechanalysis Sdn Bhd (in liquidation) v Appraisal Property Management Sdn Bhd* as can be drawn in para 12 of the GOJ. Alas, apart from referring to the correct principle, it is apparent that His Lordship failed to consider all the circumstances of the case, which necessarily, in our considered view, includes considering the defendant's arbitration claim as to whether it is bona fide and legitimate with a reasonable chance of success or otherwise.

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A [35] Based on the GOJ of the learned JC as at para [12] aforementioned, it is apparent the learned JC only considered the defendant's financial capacity. No consideration was given to whether the arbitration claim by the defendant was bona fide with merit or not. Thus, we are of the considered view that the learned JC was wrong in failing to do so, which entitled the intervention of this court. We are guided in our view by the Federal Court case of *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1 where in para 54 it was held:

C [54] ... Premised on *Thomas v Thomas* and *Henderson* Lord Reed qualified that the 'plainly wrong' test only comes into play in the absence of the following:

- (a) material error of law;
- (b) critical factual finding which had no basis in evidence
- D (c) demonstrable misunderstanding of relevant evidence; and
- (d) *demonstrable failure to consider relevant evidence.*

E *In the presence of any of the above, the appellate court is entitled to set aside the judgment of the trial court without having to consider the 'plainly wrong' test.* Lord Reed reiterates that these four identifiable errors are however not exhaustive. It appears that the other examples which could be added to this non-exhaustive list, are as listed in *Thomas v Thomas* namely: (a) there is misdirection by the judge; (b) there is no evidence to support a particular conclusion; (c) There is material inconsistencies or inaccuracies; (d) the trial judge fails to appreciate the weight and bearing of circumstances admitted or proved. (Emphasis added.)

F [36] As such, and in conclusion on this point, we find that the learned JC's exercise of discretion to order security for costs on the defendant herein is to be legally wrong for failing to consider the defendant's arbitration claim.

G Conclusion

H [37] Based on the aforesaid, in the circumstances of this case, we find that the learned JC was plainly wrong and was erroneous in ordering the defendant to pay security for costs as prayed for by the plaintiff, which warrant our appellate intervention. We would, therefore, allow the defendant's appeal and set aside the High Court order dated 28 November 2021. The arbitral proceeding is to proceed accordingly.

I *Ground (ii) — Learned JC's finding on the defendant's impecuniosity*

[38] In allowing the plaintiff's application, the learned JC at para 22 GOJ concluded as follows:

[22] ... Being insolvent, accounts have been frozen, audited accounts experienced deficit and failure to pay the costs, I agreed with the plaintiff that security for costs is reasonably justified to be imposed on the defendant.

A

[39] Learned counsel submitted that the learned JC erroneously ruled that the defendant was insolvent and would be unable to pay/settle costs for the arbitration in the event it is ordered to do so. Counsel claimed that the defendant's financial woes were only temporary and that the defendant would be able to settle the judgment sum should it fail in its arbitration claim. In fact, according to counsel, the defendant had paid the sum of RM1,615,280 to the plaintiff for works done under the contract. Counsel averred that the defendant's financial woes were a causal effect of the plaintiff's breach of the contract, and it was on this that the arbitration claim was premised on. Counsel further submitted that the learned JC was also in error in finding that the defendant's failure to pay the costs as ordered by the court for earlier related matters between the parties is relevant to the application for security for costs.

B

C

D

[40] Learned counsel for the plaintiff submitted that the learned JC was perfectly correct in taking the defendant's financial capability and capacity, which was based on the defendant's inability/refusal to pay the costs as ordered earlier by the court for the JDS and for the appeals matters before the appellate courts. Counsel submitted that since the defendant had admitted to being insolvent, the learned JC cannot be said to be in any error or was plainly wrong in His Lordship's decision/order.

E

[41] As mentioned earlier, we are of the view that ground (i) is pivotal to the defendant's appeal and would be determinative of the defendant's appeal herein as a whole. As such, in our view, ground (ii) is now academic because even if the learned JC is correct in respect of the defendant's impecuniosity and inability to pay costs for the arbitration, based on our finding and ruling that the learned JC was plainly wrong pertaining to ground (i) aforesaid, it would not make any difference to our decision abovesaid.

F

G

[42] Hence, we reiterate that the defendant's appeal is hereby allowed with costs of RM5,000 subject to allocator.

H

Appeal allowed.

Reported by Ahmad Ismail

I